No. 93-1159

In The Supreme Court of the United States

October Term, 1993

Linda Winfield, *et al.*,
Petitioners,

v.

Richard D. Kaplan, M.D., *et al.*
Respondents.

On Petition for Writ of Certiorari to the North Carolina Court of Appeals

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REPLY TO BRIEF IN OPPOSITION

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I. INTRODUCTION

The preliminary injunction in this case represents the most extreme injunctive restriction on peaceful residential demonstrations upheld by any court to date. Pet. at 7 & n.1; *id.* at 11.

"Petitioners' march[ing], if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment." *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969) (and cases cited). Yet the injunction in this case forbids, throughout the pendency of this litigation, all "picketing, parading, marching, or demonstrating" anywhere on an entire street, plus 300 feet in any direction from that street. Pet. App. 47a.

This Court has already granted review, in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 907 (1994) (No. 93-880), of an injunction which forbids, *inter alia*, "approaching, congregating, picketing, patrolling [and] demonstrating . . . within three-hundred (300) feet of the residence" of various persons, *see* Pet. for Cert., *Madsen v. Women's Health Center, Inc.* (No. 93-880), at B-9. The geographical scope of the present anti-speech injunction considerably exceeds that of the residential restriction in the *Madsen* injunction. Accordingly, this Court should grant the present petition outright or, in the alternative, hold this petition pending decision of the *Madsen* case and then either grant plenary review or dispose of this petition summarily by granting review, vacating the decision below, and remanding this case for further proceedings in light of *Madsen*.

II. FACTS

As they have done throughout this litigation, the respondents (Kaplans) continue to distort the relevant facts. Several points bear special mention.

The residential marching of petitioners (Winfields) and their companions was at all times completely peaceful. There is simply no evidence of any trespass, excessive noise, or disorderly conduct on the part of the marchers. Respondent Richard Kaplan, as an abortionist, may feel subjective dismay at the pro-life marchers' anti-abortion *message*. But to characterize the quiet, sign-carrying procession of individuals ranging from small children to elderly women as "frighten[ing] and intimidat[ing]," Br. in Opp. at 2, is ludicrous.

Furthermore, at no time did the pro-life marchers confine themselves to the front of the Kaplan residence (or any other residence); rather, they walked along the length of the street.[1] The trial court so found, Pet. App. 45a, and there is no evidence to the contrary.

The Kaplans' claim of an "evident connection" between Ronald Benfield (a *pro se* defendant in this case) and the Winfields, Br. in Opp. at 3, is simply false. The undisputed evidence shows that Benfield has never taken part in any residential marches or other pro-life activities. On the contrary, Benfield's wife sought an abortion from respondent Kaplan. Benfield, distraught over the abortion of his child, allegedly directly threatened Kaplan's life and was convicted for this threat. Benfield's only encounters with the Winfields were scattered conversations wholly unconnected with the marching at issue here.

III. PROCEEDINGS

The Kaplans mischaracterize the proceedings below. Br. in Opp. at 4-5.

First, neither the trial court nor the court of appeals identified any misconduct associated with the residential marching in this case; rather, these courts held the

[1] The Kaplans call Waycross Drive a "short street," Br. in Opp. at 2, and a "short, dead-end street," *id.* at 14. On the contrary, Waycross extends some 2000 feet in length and intersects three other streets (one in the middle of and one close to each end of Waycross). Pet. App. 59a (map).

marching itself to be objectionable and enjoinable. The Kaplans' cannot explain away this crucial legal point.

Second, contrary to the Kaplans, the court of appeals most certainly did "rely on the picketing's [sic] message or other expressive content," Br. in Opp. at 5 (emphasis omitted), when deciding that the marching constituted "targeted picketing." *See, e.g.*, 431 S.E.2d at 841 (Pet. App. at 26a):

> The record includes *inter alia* the following evidence showing [petitioners'] targeted picketing of [respondents] home: . . . evidence that signs used by the demonstrators specifically name Dr. Kaplan; literature disseminated by the Prolife Action League listing Dr. Kaplan as on of the "major abortionists from Greensboro that go to the clinics where we are praying". . . .

Third, the court of appeals reviewed the injunction at issue under the "time, place, and manner test" traditionally used to review statutes, ordinances, and regulations. *Id.* at 842 (Pet. App. 28a-29a). The Kaplans' assertion that this test also governs anti-speech injunctions, Br. in Opp. at 5, simply begs one of the central legal questions presented in this case.

IV. JURISDICTION

Respondents present two weak arguments against this Court's jurisdiction.

A. Timeliness

First, the Kaplans argue that the present petition is untimely.

The Supreme Court of North Carolina denied the Winfields' request for review in this case. That court first voted in conference, on October 7, 1993, and then officially announced its decision, on October 18, 1993. Pet. App. 58a. The Winfields filed their petition within 90 days of the date the state supreme court announced its

order denying review, i.e., October 18, 1993; hence, the petition is timely. Sup. Ct. R. 13.1.

The Kaplans argue that this Court should count the 90 days not from the date the state supreme court *announced* its decision, but instead from the earlier date the state supreme court met in conference and *voted*—in secret—to deny review. The absurdity and injustice of the Kaplans' contention is obvious. Until a court's order is entered on the official record and made public, it makes no sense whatsoever to start the deadline clock. This Court, for example, regularly votes in conference on a Friday but publicly announces its orders on the following Monday. In calculating briefing deadlines in this Court, would the Kaplans count from the date of the intial, secret vote to grant certiorari?

Under the Kaplans' view, a state supreme court (or a clerk) could sharply limit—or even eliminate—the time for seeking review in this Court simply by delaying public announcement of its ruling. The gap in the present case between in-conference voting and public announcement was eleven days (already a significant period in comparison with the 90-days allowed). A court in other cases might stretch the gap even wider, whether because of oversight or a backlog in processing orders, leaving would-be petitioners to fall into the void.

In short, the only fair and logical interpretation of the governing law, viz., 28 U.S.C. § 2101(c) and this Court's Rule 13.1, dictates that "entry of judgment"—the start of the 90-day clock—means the official, public announcement of an order, and not *in pectore* voting. *Accord Rubber Co. v. Goodyear*, 73 U.S. (6 Wall.) 153, 155-56 (1868) (denying motion to dismiss appeal as untimely; time to appeal triggered, not by earlier order settling the terms of the decision, but by subsequent "actual" entry, signing, or filing of decree, even where latter entry states "entered as of" the earlier order); *Puget Sound Power & Light Co. v. County of King*, 264 U.S. 22, 24-25 (1924) (denying motion to dismiss writ as untimely; event

fixing the time to seek review is not prior court decision but subsequent minute entry, despite respondents' argument "that the latter is a mere formal ministerial entry of a clerical character"); *cf. Scofield v. NLRB*, 394 U.S. 423, 427 (1969) (holding petition timely where filed within 90 days of date judgment entered "in fact" where petitioners "were given no notice of any entry of judgment" on earlier date of decision below).

B. Finality

The Kaplans also argue that this Court lacks jurisdiction to review a preliminary injunction because such an order is not "final" for purposes of review. This Court has long since rejected this argument. *See, e.g., Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 312 n.5 (1968) (injunction reviewable whether permanent or temporary); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 n.* (1971) (temporary injunction reviewable); *American Radio Ass'n, AFL-CIO v. Mobile S.S. Ass'n*, 419 U.S. 215, 217 n.1 (1974) (same).[2]

V. CONFLICTS WITH OTHER LOWER COURTS' DECISIONS

The decision below conflicts in several important respects with the decisions of other lower courts. Pet. § I. The Kaplans fail in their efforts to explain away these conflicts.

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[2] The Kaplans' other finality arguments are plainly inapposite. For example, the Kaplans operate under the mistaken premise that the Winfields seek review of the state supreme court's *order denying review*. Br. in Opp. at 8, 9. On the contrary, the Winfields seek review of the North Carolina Court of Appeals' *decision on the merits*. This decision upholds an injunction which binds the Winfields "and all persons in active concert or participation with them," Pet. App. 47a, and which, unless earlier modified, "will remain in effect until this matter is resolved by a final judgment," Pet. App. 48a. *See Logan Valley*, 391 U.S. at 312 nn.3 & 5 (holding similar order "clearly final for purposes of review by this Court").

A. *Per se* unlawfulness of residential marching

The court of appeals in this case held that residential marching, without more, was an enjoinable nuisance. The Supreme Court of Texas, in *Valenzuela v. Aquino,* 853 S.W.2d 512, 513-14 (Tex. 1993), held that residential picketing is not *per se* unlawful or enjoinable. A starker conflict is difficult to imagine.

The Kaplans argue that "the only relevant difference between *Valenzuela* and this case is that the Kaplans have shown that tortious conduct that the *Valenzuela* court found missing . . .," Br. in Opp. at 13. But this "only relevant difference" is precisely the point of legal conflict: whether residential picketing or marching, despite its presumptivly protected status under the First Amendment, *Frisby v. Schultz,* 487 U.S. 474, 479 (1988) (residential picketing "at the core of First Amendment"), may be deemed inherently tortious and enjoinable.

B. Extremity of restriction on residential marching

The Kaplans ignore, but do not deny, the fact that the geographical scope of the present injunction is more extreme than any restriction on residential picketing—whether by injunction or ordinance—upheld to date.

The Kaplans point to the frequency of the marching,[3] Br. in Opp. at 14, but this is irrelevant; the injunction absolutely bans marching and does not merely regulate the frequency of marches. The Kaplans point to the number of participants in the marching,[4] *id.*, but this is also irrelevant: the injunction does not limit the number of marchers.

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[3] The Winfields and others appeared with their signs, walking along the Kaplans' street, on an irregular basis averaging about once a month. Pet. at 4.

[4] The numbers were modest: one to two dozen at a time, Pet. at 3. *Compare Frisby v. Schultz,* 487 U.S. 474, 476 (1988) ("The size of the group varied from 11 to more than 40").

The Kaplans strain to make this a fact-intensive case, but in reality this case presents legal issues in sharp relief: the participants in the residential marching were at all times peaceful and orderly, and the injunctive ban is absolute. These factors make the present case highly suitable for review.

C. Content-discrimination

The injunction in this case binds pro-life demonstrators, and only pro-life demonstrators.[5] Such a restriction is plainly content-based, indeed viewpoint-based, as the Eleventh Circuit held in *Cheffer v. McGregor,* 6 F.3d 705 (11th Cir. 1993). Yet the court of appeals held that the present injunction is content-neutral. 431 S.E.2d at 842-43 (Pet. App. 29a-31a). Thus, the conflict between the court below and *Cheffer* is manifest.

The Kaplans deny any conflict over the "argument" that "an injunction with content-neutral terms is content-based simply because it applies to named defendants." Br. in Opp. at 16. This "argument," however, grossly mischaracterizes the position of the Winfields, who cite *Cheffer* for the common sense conclusion that an injunction which only restricts the *speech* activities of proponents of a particular *point of view* is not content-neutral.

VI. CONFLICT WITH SUPREME COURT'S DECISIONS

The decision below also conflicts squarely with the applicable decisions of this Court. Pet. § II. Again, the Kaplans fail to explain away these conflicts.

A. Prior restraint doctrine

The court of appeals disregarded this Court's long-standing distinction between prior restraints (injunctions, licensing schemes) and time, place, and manner regulations (statutes, ordinances, regulations). *See* Pet. § II(A).

The Kaplans cite *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971), for their claim that the

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[5] The exception is *pro se* defendant Ronald Benfield, who never took part in any residential marches and who failed to appear and contest the injunction.

prior restraint doctrine does not apply to this case. In fact, *Keefe* compels the opposite conclusion.

Keefe, like the case at bar, was a civil suit between private parties. A resident, whose business practices certain protesters found offensive, sued to enjoin protest activities in his neighborhood. The resident alleged a private wrong—invasion of privacy, *id.* at 418—and the Illinois courts sustained an anti-speech injunction on that basis.

This Court reversed, holding the injunction to be an impermissible prior restraint. This Court held that the injunction "operates, not to *redress* alleged private wrongs, but to *suppress*," on the basis of previous expressive activities, future expressive activities. *Id.* at 418-19 (emphasis added). The key to *Keefe* was not the absence of an alleged private wrong—the *Keefe* plaintiff had alleged such a wrong—but the distinction between imposing *subsequent compensatory* liability (to "redress") and *previous* restraint (to "suppress"). This same distinction cuts in favor of the Winfields in this case: the preliminary injunction serves not to *redress* but to *suppress* allegedly tortious expressive activities.[6]

[6] The Kaplans' other purported authorities are inapposite.

The Kaplans cite cases involving picketing for an *unlawful* purpose. *American Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215 (1974); *Hughes v. Superior Court*, 339 U.S. 460 (1950). The present case involves demonstrations for *lawful* purposes, viz., protesting abortion, exposing Richard Kaplan's practice of abortion, appealing for support from Kaplan's neighbors and the general public, etc. *Cf. Keefe; Frisby.*

The Kaplans cite a case involving *commercial* speech advertising *illegal* business practices. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973). This Court noted that the *Pittsburgh Press* order "is clear and sweeps no more broadly than is necessary," and "no interim relief was granted," and that contempt sanctions were unavailable. *Id.* at 390 & n.14. All of these factors distinguish *Pittsburg Press* from the present case.

Finally, *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941), involved pervasive violence. The marching in this case has been completely peaceful.

B. Meaning of *Frisby v. Schultz*

In *Frisby v. Schultz*, 487 U.S. 474 (1988), this Court recognized a limited exception (viz., for single-residence picketing) to the established constitutional protection for expressive activities in residential areas. Pet. § II(B). By contrast, the Kaplans—and the court below—interpret *Frisby* as unleashing a new rationale whereby *all* residential protests are subject to restriction "in the interest of residential privacy," Br. in Opp. at 19. Indeed, the Kaplans claim that *Frisby* "justified a *citywide* ban on [residential] picketing," Br. in Opp. at 19, 20 (emphasis added)—precisely the construction of the challenged ordinance which the *Frisby* Court rejected on constitutional grounds, 487 U.S. at 483.

A round-the-block march as in *Gregory v. City of Chicago*, 394 U.S. 111 (1969), would plainly violate the injunction here. If *Frisby* in fact overruled *Gregory*—contrary to the *Frisby* opinion itself, 487 U.S. at 486—then this Court should say so. But if not, then this Court should grant review to remove the conflict between this Court's precedents and the decision below.

C. Content-discrimination

The injunction at issue is content-based for two reasons: it applies only to those espousing a pro-life point of view, and it is "justified" by the alleged adverse impact of the message upon the Kaplans. Pet. § II(C).

The Kaplans argue that the marchers' message is irrelevant, and that the physical aspects of the marching alone justify the ban on marching. Br. in Opp. at 20-21. This defies reality. First, the court below clearly tied its decision to the message and purpose of the marching. 431 S.E.2d at 841 (Pet. App. 26a). Second, the mere act of walking along a street carrying a sign cannot plausibly be regarded as tortious. If that were so, civil rights marches through segregated neighborhoods (or Nazi marches through Jewish neighborhoods) would be enjoinable. For that matter, *any* resident of Waycross Drive would have a cause of action for injunctive relief, since—

aside from the message—the Winfields' marching was indiscriminate in its impact.

The fact of the matter is that this case is in court because the Winfields' *message* bothered the Kaplans. To pretend otherwise is to put on blinders. By holding this injunction to be content-neutral, the court below rendered a decision which conflicts with this Court's decisions treating as content-based any restrictions justified by reference to the impact of the message. *E.g., Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2404 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation") (and cases cited).

CONCLUSION

This Court has currently pending before it a case involving the constitutionality of an injunction restricting, *inter alia*, residential demonstrations. *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 907 (1994) (No. 93-880). Accordingly, for the reasons set forth in the petition and reply in the present case, this Court should grant review in the case at bar or, in the alternative, hold this case pending *Madsen* and then either grant plenary review or summarily grant review, vacate the judgment below, and remand this case to the North Carolina Court of Appeals for further consideration in light of *Madsen*.

Respectfully submitted,

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